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IN THE

Supreme Court of the United States

October Term, 1972

No .....

JACK W. TRIPP,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Jack W. Tripp, respectfully prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cause on October 24, 1972.

I.

CITATION TO OPINION BELOW

The Opinion of the Ninth Circuit Court of Appeals printed in Appendix A hereto, *infra*, pp. A-1-A-3, is reported in ..... F.2d .....

II.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 USC §1254 (1) and Rules 19 and 22 of this Court.

III.

QUESTION PRESENTED

Whether Federal law enforcement officials violated Petitioner's rights under the Fourth Amendment to the Consitution of the United States by searching and seizing material shipped by Petitioner by air freight when there was ample time to apply for a warrant prior to such search and seizure?

IV.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV TO THE UNITED STATES CONSTITUTION

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

V.

STATEMENT OF THE CASE

A. Procedural Background

Petitioner was indicted by the Grand Jury in the United States District Court for the Western District of Washington, Northern Division, and charged with a violation of Title 18 USC §1708 — the possession of property stolen from the mails. The stolen property allegedly possessed by the petitioner was 2,891 Ten Dollar bills stolen on or about March 29, 1971 from the United States Post Office, Federal Station, at Fairbanks, Alaska (R. 1).

On November 30, 1971 the petitioner moved to suppress for the use as evidence

> "... any and all money, property, items, or contraband seized on or about September 28, 1971 at the premises of the Alaska Airlines air freight offices in Fairbanks, Alaska, and/or to suppress as evidence any statements or admissions made by said defendant following said occasion." (R. 11)

On December 13, 1971 the District Court entered an order denying petitioner's motion to suppress (R. 41).

Trial was had before the court without a jury on January 17, 18 and 19, 1972 before the Honoroable William T. Beeks. During the course of the trial, the court admitted the evidence which petitioner sought to suppress by his motion to suppress (Tr. 59, Ex. 7; Tr. 120, 121, Ex. 11 and 11A; Tr. 72, Ex. 6A; Tr. 113-119). The court found the petitioner guilty (Tr. 375) and entered its judgment and commitment on March 3, 1972 providing for imprisonment of the petitioner for a period of four years (R. 58, 59).

Petitioner moved for a judgment of acquittal, for arrest of judgment, or a new trial on the grounds that the court erred in denying petitioner's motion to suppress evidence (R. 57). This motion was denied on March 3, 1972 and the written order was entered on March 8, 1972 (R. 78).

An appeal was timely taken which resulted in the opinion and judgment petitioner now asks this Court to review in his Petition for Writ of Certiorari.[1]

B. Factual Background

As noted in the opinion of the court below, the facts relating to the issue here presented are not in dispute. Airline

1. Petitioner did file with the Ninth Circuit Court a petition for rehearing with a suggestion of the appropriateness of rehearing *en banc*. This petition was rejected as not being timely filed even though a motion had been submitted to the Court to permit its 3-day late filing supported by reasons deemed by petitioner to be adequate.

officials opened a package shipped air freight by petitioner to a third party. The package was opened by the airline officials as they had reason to believe that the contents of the package had been damaged in shipment. A substantial number of Ten Dollar bills were discovered and called to the attention of the airlines air freight supervisor. The air freight supervisor knew the petitioner, knew the person to whom the package was shipped, knew both were former postal employees at the Fairbanks Post Office, and knew of a theft at the Fairbanks Post Office in which a substantial number of Ten Dollar bills were stolen. The air freight supervisor contacted by telephone the FBI and the postal inspector who was investigating the theft at the Fairbanks Post Office. The postal inspector learned that some of the serial numbers on the Ten Dollar bills matched those of the Ten Dollar bills which had been stolen. The discovery was reported to the Federal officials at approximately 2:00 in the afternoon on a day when courts were open. Within an hour, postal inspectors arrived at the air freight office, searched the package and its contents, and seized the same. There were no exigent circumstances rendering it necessary to make a prompt search and seizure. Neither the FBI nor the postal inspectors obtained a warrant authorizing the search or seizure of the goods.

The consignee did not arrive to pick up the package until in the evening after Federal officials had searched and seized the package. Even then the consignee was told that he had been notified that the package had arrived in error and to check again the following day. The consignee returned the next day and was advised that the postal inspectors had the package (R. 23).

VI.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court Below Is in Conflict With Applicable Decisions of This Court

The plain holding of *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564, 91 S. Ct. 2022 (1971), was that a search or seizure without a warrant may be justified only if exigent circumstances rendered it impracticable to obtain a warrant. The majority of this Court rejected a test based upon the reasonableness of the search or seizure in favor of the test of the reasonableness of the failure to obtain a warrant. In doing so, the majority held invalid two searches of an automobile which had been impounded by the police at the time of the defendant's arrest.

The opinion of the court below appears to justify the search and seizure in the case at bar on the grounds that the discovery of the money was "the inadvertent result of a lawful private search" and the "money was in plain view" to the law enforcement officials who searched and seized the same. The so-called "plain view" exception to the warrant requirement was shown by the majority of this Court in *Coolidge* to be justified only where there were exigent circumstances which justified the failure to obtain a warrant. The majority in *Coolidge* made it clear that "plain view" searches and seizures without a warrant are not allowed when the law enforcement official knows in advance of the search and seizure that he will find evidence in plain view. The plain view exception applies only to an *inadvertent* discovery of evidence and not an *advertent* one. This Court stated:

> ". . . The determining factors are advance police knowledge of the existence and location of the evi-

> dence, police intention to seize it, and the ample opportunity for obtaining a warrant." (p. 592)

The majority of this Court went on to state:

> "This court has never permitted the legitimation of a planned warrantless seizure on plain view grounds . . . and to do so here would be flatly inconsistent with the existing body of Fourth Amendment case law. A long line of cases . . . make it clear beyond doubt that the mere fact that the police have legitimately obtained a plain view of a piece of incriminating evidence is not enough to justify a warrantless seizure." (Footnote 27 at page 586 referred to by the court at page 592)

On June 19, 1972 this Court reaffirmed the Fourth Amendment holding of *Coolidge* in an opinion written by Justice Powell and concurred in by all other members of the Court considering the case except Justice White who concurred on statutory and not constitutional grounds.[2] *U.S. v. District Court for the Eastern District of Michigan, Southern Division, et al,* .... U.S. ...., 32 L.Ed.2d 752, 92 S. Ct. 2125 (1972).

Justice Powell clearly and without equivocation announced for the Court the ruling that searches and seizures may not be justified under the Fourth Amendment without advance judicial approval through the warrant procedures, unless exigent circumstances render it impracticable to apply for a warrant in advance of the search and seizure. Quotations from this opinion follow:

> "Though the Fourth Amendment speaks broadly of 'unreasonable searches and seizures', the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause. Some have argued that 'the relevant test is not whether it was reasonable to procure a search warrant, but whether

2. Justice Rehnquist took no part in this case.

the search was reasonable', *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950). This view, however, overlooks the second clause of the Amendment.

"...

"...

". . . this Court 'has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end'. *Katz*, supra, at 356-357. The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government. . . . Prior review by a neutral and detached magistrate is the time tested means of effectuating Fourth Amendment rights. *Beck v. Ohio*, 379 U.S. 89, 96 (1964).

"It is true that there have been some exceptions to the warrant requirement. *Chimel v. California*, 395 U.S. 752 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *McDonald v. United States*, 335 U.S. 451 (1948); *Carroll v. United States*, 267 U.S. 132 (1925). But those exceptions are few in number and carefully delineated. *Katz*, supra, at 357; in general they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction. Even while carving out those exceptions, the Court has reaffirmed the principle that the 'police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure'. *Terry v. Ohio*, supra, at 20; *Chimel v. California*, supra, at 762," (pp. 3137, 3138. Footnotes omitted)

In the case at bar it is undisputed that the search and seizure of the items here in question was conducted without a warrant when there was ample opportunity to apply

for one. The decision of the Ninth Circuit Court of Appeals sustaining this search and seizure is simply out of accord with both *Coolidge* and *U.S. v. District Court* and misconceives totally the application of the plain view exception to the warrant requirement of the Fourth Amendment.[3]

2. The Opinion of the Court Below Is in Conflict With Decisions From the Fifth and Sixth Circuits on the Same Matter

In *U.S. v. Colbert*, 454 F.2d 801, 10 CR. L. 2445 (CA 5, Feb. 1, 1972), police arrested the defendants for failure to possess draft cards. At the time of the arrest, the police placed in the police car, brief cases taken from the person of the defendants. The court held that shotguns found inside the brief cases must be suppressed. In doing so, the court stated:

> "Here, as in *Coolidge*, there are no exigent circumstances to which the government can point to demonstrate that it was not practicable for the police officers to detain the brief case and procure a search warrant."

To the same effect, see *U.S. v. Resnick*, 455 F.2d 1127 (CA 5, Feb. 3, 1972), where the court held the "plain view"

3. The trial court erroneously admitted into evidence the Ten Dollar bills which were found in the package (Ex. 7; Tr. 59); lists of the serial numbers of the Ten Dollar Bills prepared by postal inspectors after the money was seized (Ex. 11 and 11A; Tr. 120, 121); and the package which was shipped and its contents (Ex. 6A; Tr. 72). The trial court also erroneously admitted into evidence products of the illegal search and seizure including the sales slip issued when the defendant purchased the lithograph in which the Ten Dollar bills were found (Ex. 4; Tr. 58); the freight bill prepared to ship the lithograph (Ex. 6; Tr. 66); the traveler's check used to purchase the lithograph (Ex. 5; Tr. 59); and a purported statement of the defendant to the postal inspectors which was obtained when the postal inspectors confronted the defendant with the information obtained as a result of the unlawful search and seizure. (Tr. 113-119). All of these items should have been suppressed. *Wong Sun v. U.S.*, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963).

exception was not applicable and could not justify the seizure of items in plain view where there was no proof that it was not practicable to obtain a warrant in advance.

Cash v. Williams, 455 F.2d 1227 (CA 6, Feb. 18, 1972), is a case almost on all fours with the case here for review. The defendant's brother-in-law in *Cash*, while driving defendant's car, was arrested for reckless driving and driving without a license. Defendant's car was impounded by a private garage owner at the request of the police. On the following day, the garage owner went through the car looking for evidence of ownership of the vehicle. During this private search, the garage owner discovered a sack full of grassy substance and a coat with the same grassy material in the pocket. The garage owner could not positively identify the substance. A police officer was called who also was unable to positively identify the substance. An agent of the state Bureau of Investigation was then called. This agent identified the material as marijuana. The court held the search and seizure of the contraband invalid as the police, upon being informed of the discovery of the grassy substance, had adequate opportunity to apply for a warrant. In doing so, the court stated:

> "Had the evidence admitted at trial been the product of Rainey's search only, it would have been admissible because a search by a private citizen not acting in concert with or at the direction of the police is not a violation of the fourth amendment's prohibition of unreasonable searches. . . . But Rainey did not conduct the search alone; he called the police to the scene to assist in and to complete the search. A search lawful at its inception may become illegal as its scope broadens unless the steps taken can independently satisfy fourth amendment requirements."

The decision of the Ninth Circuit Court of Appeals in

the case at bar conflicts with the decisions from the Fifth and Sixth Circuit Court of Appeals. This Court should grant this petition for writ of certiorari in order to secure uniformity of decisions in Federal courts.

3. This Case Involves a Question of Exceptional Importance

This Court has consistently recognized that the Fourth Amendment is "a valued part of our constitutional law for decades" and "an important working part of our machinery of government, operating as a matter of course to check the 'well intentioned but mistakenly overzealous executive officers who are a part of any system of law enforcement'." *U.S. v. U.S. District Court for the Eastern District of Michigan, Southern Division, et al, supra,* quoting from *Coolidge v. New Hampshire,* 403 U.S. 443, 491, 20 L.Ed.2d 564, 91 S. Ct. 2022 (1971).

Uniformity of decision is needed in this important area. *Coolidge, supra,* which involved the search and seizure of the contents of an automobile, received a bare majority concurrence on the issue here presented. On the other hand, a nearly unanimous court in *U.S. v. U.S. District Court for the Eastern District of Michigan, Southern Division, et al, supra,* seems to support the *Coolidge* holding in the area of wire tapping. This Court should accept review of this case so that Federal and state courts and Federal and state law enforcement officials might be able to determine the proper rule to apply with respect to all searches and seizures. The unequivocal promulgation of what this petitioner conceives the rule to be—a search or seizure without a warrant may be justified only if exigent circumstances renders it impracticable to obtain a warrant

—would settle this important issue the settlement of which would be of immeasurable benefit to Federal and state courts and Federal and state law enforcement officials.

VII.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

MURRAY B. GUTERSON
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK W. TRIPP,
Defendant-Appellant.

[Filed Oct. 24, 1972]

No. 72-1629

Appeal from the United States District Court
for the Western District of Washington

Before: CHOY and GOODWIN, Circuit Judges,
and SOLOMON, District Judge*

SOLOMON, District Judge:

Jack W. Tripp, appellant, was convicted of possession of property stolen from the United States mails (18 U.S.C. § 1708) in a court trial. The sole issue here is whether the trial judge erred in denying Tripps' motion to suppress evidence seized without a warrant.

The facts are not in dispute. On March 25, 1971, the Federal Reserve Bank in Seattle, Washington, sent by registered mail $80,000 in new ten dollar bills to the Alaska National Bank of Fairbanks. When the money arrived, it was placed in a safe at the Fairbanks, Alaska, Post Office. On the following morning the money was gone.

Six months later, when a ramp serviceman for Alaska Airlines at Fairbanks checked freight for damage, he shook

*Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

a package and heard what he thought was broken glass. He took the package to the airline agent who saw that it was addressed to Fairbanks Office Postal Supply Co., one of the airline's large accounts. The agent told the serviceman to open the package and check it for damage. The package contained a framed Norman Rockwell print. When the agent attempted to shake out the broken glass, he found some ten dollar bills protruding from the backing of the frame. When he removed the backing he discovered a substantial number of ten dollar bills. He took the package and its contents to Mr. Westphalen, the air freight supervisor for Alaska Airlines.

The consignee of the package was "Fairbanks Office Supply Co., Attention Bill Sparks." Mr. Westphalen knew that Sparks was a former Postal Inspector at the Fairbanks Post Office, and he knew that the shipper, Jack Tripp, had formerly been the Postmaster at that post office. He also knew of the postal theft.

Westphalen attempted to call the FBI in Fairbanks and when unsuccessful called the FBI in Anchorage. An agent there instructed Westphalen to record the serial numbers of the bills. Postal Inspectors were immediately sent to the airline office to investigate. Mr. Devere, one of the inspectors, was investigating the March robbery. Before he arrived at the airline office, Devere spoke to the FBI agent in Anchorage and was told the cricumstances which led to the discovery of the bills. He was also told that some of the serial numbers obtained by Westphalen matched those which were part of the March 25, 1971, inventory at the Seattle Federal Reserve Bank. The Postal Inspectors arrived at the airline offices, signed a delivery receipt for the package and took possession of its contents. Neither the

FBI nor the Postal Inspectors obtained a warrant authorizing the seizure of the goods.

Tripp argues that the seizure was unlawful for lack of a proper warrant. His claim is based on cases dealing with unlawful searches [*e.g., Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Corngold v. United States,* 367 F.2d 1 (9th Cir. 1966)].

The search in the present case was not unlawful. The principal object of the Fourth Amendment is to protect citizens from governmental invasion of privacy, *Warden v. Hayden,* 387 U.S. 294 (1967). Here neither the FBI nor the Postal Inspectors instigated this inspection. Tripp's "privacy" was invaded, not by government, but by the private inspection of his package by the airline. He does not question the right of the airline to inspect his package. The discovery of the contraband was the inadvertent result of a lawful private search. The money was in plain view after the package was opened.

Mr. Westphalen called the FBI on his own initiative immediately after the money was discovered. Under similar facts, the Sixth Circuit recently ruled that a warrant is not required before the police may seize the contraband. *United States v. Winbush,* 428 F.2d 357 (6th Cir. 1970). When the money was seized, it was in plain view of the Postal Inspectors who were lawfully on the premises of Alaska Airlines. Under these circumstances a warrantless seizure does not violate the Fourth Amendment. *Coolidge v. New Hampshire, supra.*

The judgment of conviction is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-755

JACK W. TRIPP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Western District of Washington, petitioner was convicted of having possessed property stolen from the United States mails, in violation of 18 U.S.C. 1708. He was sentenced to four years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed (Pet. App. A).

The facts are not in dispute. The Federal Reserve Bank in Seattle, Washington, sent $80,000 in new ten-dollar bills by registered mail to a bank in Fairbanks, Alaska. The currency was stolen from the

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custody of a Fairbanks post office. Six months later a freight employee of Alaska Airlines checking a shipment suspected that a package had been damaged and heard broken glass inside it. An airline agent opened the package to ascertain the damage. The parcel contained a framed lithograph, the glass on which had shattered. He found that protruding from the back of the frame were a number of ten dollar bills. The package was dismantled and taken to the office of the airline's freight supervisor, Val Westphalen, who knew that the consignor of the package, petitioner, was a former postmaster at the post office where the theft had occurred; he also knew that the consignee was a former postal inspector (Pet. App. A-2). Westphalen then telephoned the FBI and postal officials (Tr. 88-90).[1] Merlin DeVere, the postal inspector, who had been investigating the robbery, recalled that Westphalen said " 'We have a hot potato' " (Tr. 104). Westphalen asked the inspector and his associate to come to his office immediately, because the consignee had been notified of the arrival of the parcel and might appear at any time to claim it (Tr. 90-91). When the inspectors reached the air freight office, the money was spread out on top of the package (Tr. 104). Westphalen testified that "we didn't want that large amount of money around the office" and that he had told the inspectors they could take custody of the parcel by signing the delivery receipt. He then delivered the

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[1] "Tr." refers to the trial transcript. "Memo." refers to the Memorandum in support of Defendant's Motion to Suppress. We are lodging a copy of each with the Clerk of this Court.

package and its contents to Inspector DeVere (Tr. 93). The postal inspectors had no warrant.

Petitioner's sole contention is that, by accepting the package from Westphalen without first having obtained a search warrant, the postal inspectors conducted an illegal search and seizure. (In the district court, petitioner recognized that the government did not participate in a search, claiming only that the acquisition was an unlawful seizure (Memo., pp. 2, 6).) Since the undisputed trial testimony showed that the package had been completely opened and that its contents were within plain view at the time the postal inspectors arrived, petitioner has no grounds for challenging the constitutionality of the "search" by employees of the freight carrier. Since the money was stolen, there is little basis for recognizing his standing to contest the lawfulness of the postal inspectors' "seizure" of the money discovered by the airline employees.

In any event, acceptance of the package by the federal officers in the absence of a warrant did not constitute an illegal seizure. Where a private person, lawfully or unlawfully, makes a search and voluntarily turns over the results to government officials, the evidence so obtained is not rendered inadmissible by the exclusionary rule of the Fourth Amendment, which was designed to protect against unlawful governmental action. *Burdeau* v. *McDowell,* 256 U.S. 465. See also *Coolidge* v. *New Hampshire,* 403 U.S. 443, 487.

Even if the government's acquisition is deemed a "seizure" within the Fourth Amendment, it was justified. Although the agents' discovery of the money was

not a "plain-view" seizure in the classic sense discussed in *Coolidge* v. *New Hampshire, supra,* since it was not "inadvertent," the seizure without a warrant was clearly justified by the exigent circumstances that were present. Westphalen had communicated to Inspector DeVere his concern that the consignee might claim the package at any time and that the situation was therefore urgent. In such circumstances, the inspectors acted reasonably in surmising that there was insufficient time to obtain a warrant. See *Parish* v. *Peyton,* 408 F. 2d 60 (C.A. 4), certiorari denied, 395 U.S. 984; *United States* v. *Thomas,* 319 F. 2d 486, 488 (C.A. 6).

Contrary to petitioner's contention, there is no conflict between the position taken by the court of appeals in this case and decisions of the Fifth and Sixth Circuits. Both *United States* v. *Resnick,* 455 F. 2d 1127 (C.A. 5), and *Cash* v. *Williams,* 455 F. 2d 1227 (C.A. 6), involved searches in which government authorities actually participated. Furthermore, in neither case was there any danger that delay would result in the loss of the evidence. On facts similar to those presented here, these circuits have refused to suppress the evidence obtained. *United States* v. *Hodges,* 448 F. 2d 1309 (C.A. 6); *United States* v. *Winbush,* 428 F. 2d 357 (C.A. 6), certiorari denied, 400 U.S. 918; *Barnes* v. *United States,* 373 F.2d 517 (C.A. 5). The Eighth Circuit is also in accord with this position. *Kaufman* v. *United States,* 453 F. 2d 798 (C.A. 8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

☆ U.S. Government Printing Office: 1973—492-117/408